KENNETH TEH AH KIAM & ANOR. (RECEIVERS & MANAGERS OF GLOBAL PACIFIC TEXTILE INDUSTRIES SDN. BHD.)

v.

KETUA PENGARAH JABATAN KASTAM & EKSAIS & 2 ORS.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' WAN ADNAN BIN ISMAIL J.
[ORIGINATING SUMMONS NO. R2-24-115-92]
27 MAY 1994

COMPANY LAW: Receivers and managers appointed under debentures - Priority of payments - Goods seized under s. 30(1) Sales Tax Act 1972 - Goods seized prior to appointment of receivers and managers - Whether goods seized subject to floating charges - When does floating charge crystalise - Consideration of ss. 191(1), 292(3) Companies Act 1965, s. 10 Government Proceedings Act 1956, s. 66 Employees Provident Fund Act 1991.

REVENUE LAW: Goods seized for failure to pay sales tax - Whether goods seized were subject to the floating charges under the debentures - Priority of payments - Applicability of s. 66 of the Employees Provident Fund Act 1991 to the sale proceeds of the goods seized - Sales tax collected not kept separately from the other funds of the company - Whether s. 292(3) Companies Act 1965 applicable.

The plaintiffs sought declarations with regard to the priority of the claims for customs and excise duties and sales tax and the employees provident fund contributions above the debenture holders of Global Pacific Textile Industries Sdn. Bhd. (In receivership) (GPT1) and the costs and expenses incurred by the Receivers and Managers in the course of the receivership.

On the failure of GPTI to pay the sales tax the first defendant invoking s. 30(1) of the Sales Tax Act 1972, seized the goods belonging to GPTI before the appointment of the plaintiffs as Receivers and Managers and notified their intention to sell the goods seized.

The issues before the Court are the relative priority of the claims and whether the seized goods prior to the appointment of the Receivers was part of the assets of the GPTI subject to the floating charge of the debentures.

Held:

[1] Once the goods have been seized under s. 30(1) of the Sales Tax Act it ceased to be in the possession and under the control of GPTI. The first defendant is entitled to appropriate the proceeds of the sale of the seized goods towards sales tax. The floating charge of the debentures gets crystalized only on the appointment of the Receivers and the seizure effected prior to the crystalization will not be subject to a floating charge.

[2] The customs duties and the sales tax leviable against GPTI have priority of payment over the claims of the debenture holders and the Receivers and Managers for their costs and expenses, in view of the decision in *Anuarul Aini's* case. The Employees Provident Fund contributions also have priority over the claims of the debenture holders and the Receivers and Managers.

[3] Though it is the claim of the first defendant that the sales tax collected by the GPTI was not remitted but utilised by GPTI to pay the wages of the employees, there is no evidence that the sales tax collected were kept separately from the other funds of GPTI. Therefore s. 292(3) of the Companies Act will have no application. In respect of the goods not seized the Employees Provident Fund contributions take priority over claims for customs duties and sales tax.

[4] Section 66 of the Employees Provident Fund Act 1991, will apply in respect of the goods of the GPTI seized by the first defendant and therefore the proceeds of the sale of the goods must first be applied towards the payment of Employees Provident Fund contributions for 12 months as laid down therein.

[Orders accordingly].

Cases referred to:

Robson v. Smith [1895] 2 Ch. 118 ***(refd)***
Rother Iron Works Ltd. v. Canterbury Precision Engineers Ltd. [1973] 1 All ER 394 ***(refd)***
Croshaw v. Lyndhurst Ship Company [1897] 2 Ch. 154 ***(refd)***
Anuarul Aini & Anor. v. Ketua Pengarah Kastam Dan Eksais Diraja Malaysia, Johore Bahru [1991] 1 MLJ 360 ***(foll)***
Chuah Teong Hooi & Anor. v. Employees Provident Fund Board [1990] 2 MLJ 218 ***(foll)***

Legislation referred to:

Companies Act 1965 ss. 191(1), 292(3)
Customs Act 1967, ss. 11, 14A, 65, 101(1)

Employees' Provident Fund Act 1991, ss. 51, 65, 66
Government Proceedings Act 1956, s. 10
Sales Tax Act 1972, ss. 23, 30(1) & (2), 34(1), 70

For the plaintiffs - Ng Sai Yeang; M/s.Raja, Darryl & Loh
For the 1st & 2nd defendants- Mohamed Bazain Bin Idris, Penasihat Undang-Undang Jabatan Kastam & Eksais
For the 3rd defendant-Mohd. Naim Daruwish, Pengurus Jabatan Perundangan KWSP

JUDGMENT

Wan Adnan bin Ismail J:
In this application the plaintiffs are asking for the following declarations and orders:

(1) that a declaration be made whether on the true construction of the provisions of the Customs Act 1967, in particular ss. 11 and 65 thereof, and the provisions of the Companies Act 1965, in particular ss. 191 and 292 thereof, the customs duties leviable against Global Pacific Textile Industries Sdn Bhd (in receivership) has priority of payment over the claims of the following:

(a) The Hongkong & Shanghai Banking Corporation Limited and The Pacific Bank Berhad, both the debenture holders of the said Global Pacific Textile Industries Sdn Bhd (in receivership), including the claims for the principal and interest due to them and

(b) the Receivers and Managers of the said Global Pacific Textile Industries Sdn Bhd (in receivership) being costs and expenses incurred by them in the course of its receivership;

(2) that a declaration be made whether on the true construction of the provisions of the Sales Tax Act 1972, in particular ss. 23 and 70 thereof, and the provisions of the Companies Act 1965, in particular ss. 191 and 292 thereof, the sales taxes leviable against the Global Pacific Textile Industries Sdn Bhd (in receivership) has priority of payment over the claims of the parties as stated in paragraphs (1)(a) and (1)(b) above;

(3) that a declaration be made whether on the true construction of the provisions of the Employees' Provident Fund Act 1991, in particular s. 51 and 65 thereof, and the provisions of the Companies Act 1965, in particular ss. 191 and 292 thereof, the Employees Provident Fund contributions payable by Global Pacific Textile Industries Sdn Bhd (in receivership) have priority of payment over the claims of the parties as stated in paragraphs (1)(a) and (1)(b) above;

(4) that in the event that the Court does hold that the said customs duties, sales taxes and employees provident fund contributions as stated in paragraphs (1), (2) and (3) above do rank in priority over the preferential debts and the claims of the parties as stated in paragraphs (1)(a) and (1)(b) above, that a declaration be made whether on the true construction of the provisions of the Companies Act 1965, the Customs Act 1967, the Sales Tax Act 1972 and the Employees' Provident Fund Act 1991, which of the said custom duties, sales taxes and employees provident fund contributions leviable rank in priority and their ranking of the same *vis a vis* one another;

(5) that the Court do make orders consequential to the above including orders and directions in respect of the amount to be paid by Global Pacific Textile Industries Sdn Bhd (in receivership) to each of the defendants concerned (where applicable);

(6) that the Court do make orders in respect of the costs of and incidental to this application herein and/or that the costs of and incidental to this application herein be borne and paid out of the assets of the Global Pacific Textile Industries Sdn Bhd (in receivership) prior to any payments ordered to be made to the defendants concerned; (where applicable);

(7) that the plaintiffs do have liberty to apply and

(8) for such further or other orders and relief as this Honourable Court deems fit.

The plaintiffs are the Receivers and Managers of Global Pacific Textile Industries Sdn Bhd (in receivership) (hereinafter referred to as "GPTI"). They were appointed on 16 March 1992, by the Hongkong & Shanghai Banking Corporation Limited and the Pacific Bank Berhad (hereinafter collectively referred to as "the debenture holders") pursunant to two debentures dated 1 June 1990 granted by GPTI in favour of the debenture holders.

As at 31 July 1992 the amount claimed by the Defendants to be owing by GPTI are as follows:

(i) the sum of RM122,388.79 claimed by the Director General of Customs and Excise being customs duties leviable.

(ii) the sum of RM972,338.06 claimed by the Director General of Customs and Excise being sales tax leviable.

(iii) the sum of RM835,600 claimed by the Employees Provident Fund Board being the employees' provident fund contributions payable.

As at 31 October 1992, the amounts due and owing by GPTI to the debenture holders the

Hongkong & Shanghai Banking Corporation Limited and the Pacific Bank Berhad are RM4,989,710.69 and RM6,291,809.03 respectively.

As at 31 July 1992 the estimated realisable assets of the GPTI is in the region of RM11,248,000 which consists of the following:

(a) the sum of RM10,222,000 being the estimated sum realisable from the fixed assets of GPTI; and
(b) the sum of RM1,026,000 being the estimated sum realisable from the assets of GPTI subject to the floating charges under the debentures.

According to the first defendant because of the failure of GPTI to pay the sales tax, the first defendant invoked his power under s. 30(1) of the Sales Tax Act 1972 and seized goods belonging to GPTI. The seizures were made on 6 March 1992, 8 March 1992 and 10 March 1993 before the appointment of the plaintiffs as the Receivers and Managers which was on 16 March 1992. Pursuant to s. 30(2) of the Act the first defendant issued a notice to GPTI notifying his intention to sell the goods seized. The goods have not been sold because the plaintiffs had persuaded the first defendant to postpone the sale.

It is the contention of the first defendant that the goods seized by the first defendant no longer form part of the assets of GPTI subject to the floating chages. At the time the floating charges were crystalised the goods seized were already outside the possession or right of GPTI. Thus the plaintiffs cannot claim a right over the said goods as forming part of the items in receivership.

Section 30(1) of the Sales Tax Act 1972 states as follows:

30.(1) Where -

(a) the whole or any part of sales tax or other moneys payable under this Act has not been paid; or
(b) the whole or any part of any sales tax or other moneys, after having been paid, has been erroneously refunded,

then, provided a demand is made within three years from the date on which such sales tax or other moneys were payable, or deficient sales tax or other moneys were paid, or the refund was made, as the case may be, the person liable to pay such sales tax or other moneys or the person to whom such refund has erroneously been made, as the case may be, shall pay the deficiency or repay the amount paid to him in excess, and without prejudice to any other remedy for the recovery of the amount due, any goods belonging to such person which may be in Excise or Customes control or at a place or places specified in the licence issued under s. 13 may be seized until such sales tax or deficiency be paid or the refund be repaid, as the case may be.

Sub-section (3) of the said section provides as follows:

(3) The proceeds of the sale of any such goods shall be applied to the payment of the sales tax and other moneys or recovery of the amount due or other charges which may be due in respect of selling off such goods, and the surplus if any, shall be paid to the owner of such goods and if the owner cannot be found within one month of the sale, such surplus shall be paid to the Consolidated Fund.

It is very clear that the first defendant had the right to sell the goods seized to recover the sales tax. It is not necessary for the first defendant to resort to civil proceedings. Once seizure under sub-section (1) had been effected the said goods ceased to be in the possession of GPTI and therefore outside their control. The first defendant is entitled to utilize the proceeds of the sale of the said goods to recover the sales tax.

In *Robson v. Smith* [1895] 2 Ch. 118, Romer J. said:

Debentures like the plaintiff's have been frequently considered by the Courts. They constitute what is called a "floating security"- that is to say, they allow the company to deal with its assets in the ordinary course of business until the company is wound up or stops business, or a receiver is appointed at the instance of the debenture-holders, or, as it has been said (see *In re Standard Manufacturing Co.*), they constitute a charge, but give a licence to the company to carry on its business. So long as the debentures remain a mere floating security, or, in other words, the licence to the company to carry on its business has not been terminated, the property of the company may be dealt with in the ordinary course of business as if the debentures had not been given, and any such dealing with a particular property will be binding on the debenture-holders, provided that the dealing be completed before the debentures cease to be merely a floating security.

In *Rother Iron Works Ltd. v. Canterbury Precision Engineers Ltd.* [1973] 1 All ER 394, the plaintiff company on 4 October 1971, owed the

defendants £124 for goods sold and delivered. Between 4 and 18 October 1971, the plaintiff company contracted for the sale by the plaintiff company and purchase by the defendants of goods to the value of £159. On 21 October before the contract had been carried out the bank appointed a receiver and manager under its debenture, whereupon the floating charge crystalized. The goods ordered by the defendants were delivered to them on 3 November. The receiver claimed that the defendants were not entitled to set off the plaintiff company's debt of £124 since the defendants' debt having arisen on delivery of the goods after crystalisation of the floating charge was an asset of the company which thereby became subject to the bank's charge. It was held that the defendants were only liable to pay £35 to the receiver and being entitled to set off the £124 due to them under the earlier contract. Russell LJ held:

> Those rights were always subject to a right in the defendants to assert that since the plaintiff company owed £124 to the defendants a payment of £35 would settle the account; and the debenture holder as equitable assignee could not be in a different or better position in that regard than the plaintiff company.

In the present case when the goods were seized pursuant to s. 30(1), GPTI was still carrying on business as the floating charges had not yet been crystalized. The seizures are therefore binding on the plaintiffs as Receivers & Managers. It is also my opinion that the first defendant should be allowed to proceed with the sale of the goods seized. In *Croshaw v. Lyndhurst Ship Company* [1897] 2 Ch. 154 Stirling J. said:

> It is now well settled that the Court has a discretion as to whether it will allow proceedings which have reached a certain point to go further or not. That was laid down in *In re Great Ship Co.*, which has been followed in many subsequent decisions. As to the exercise of this discretion the general rule which has been laid down amounts to this: that where as regards execution creditors the sheriff has at the date of the commencement of the winding-up actually seized goods belonging to the company, but has not sold them, the Court will, in the absence of special circumstances, allow the execution to be proceeded with, and the goods to be sold and realized. On the other hand, if the writ has merely reached the hands of the sheriff and he has not seized, the Court has held that it will not allow the proceedings to go further-again in the absence of special circumstances.

Section 191(1) of the Companies Act 1965 provides as follows:

> 191. (1) Where a receiver is appointed on behalf of the holders of any debentures of a company secured by a floating charge or possession is taken by or on behalf of debenture holders **of any property comprised in or subject to a floating charge,** then if the company is not at the time in the course of being wound up, debts which in every winding up are preferential debts and are due by way of wages, salary, vacation leave or superannuation or provident fund payments and any amount which in a winding up is payable in pursuance of s. 292(3) or (5) shall be paid out of any assets coming to the hands of the receiver or other person taking possession in priority to any claim for principal or interest in respect of the debentures and prescribed by that section in respect of those debts and amounts.
> (emphasis added)

This section is only applicable in respect of "any property comprised in or subject to a floating charge." As I hold that the goods seized by the first defendant pursuant to s. 30(1) of the Sales Tax 1972 are not subject to the floating charges this section is not aplicable in respect of the said goods. But this section does apply to all other goods of GPTI which are not seized by the first defendant (hereinafter referred to as 'the other goods').

As stated earlier, the first defendant is also claiming a sum of RM122,388.79 being the customs duties payable by GPTI. According to the first defendant the customs duties were not collected at the time of import because GPTI had applied to the Minister of Finance under s. 14A of the Customs Act 1967, for the import duties to be exempted. But the Minister had only granted a partial exemption. Thus the amount became due and owing.

In the case of *Anuarul Aini & Anor v. Ketua Pengarah Kastam Dan Eksais Diraja Malaysia, Johore Bahru* [1991] 1 MLJ 360 the Court held that sales tax is accorded priority of payment by reason of the provision of s. 10 of the Government Proceedings Act 1956, which is as follows:

> 10 (1) All debts due and claims owing from time to time by any person to the Government, whether upon judgement, bond, or other specialty, or upon simple contract or otherwise, shall be entitled from the date of the accrual thereof, respectively, to a preference of payment over all debts or claims of every kind which shall, subsequent to such date, have

been contracted or incurred by or become due from such person to any other person whomsoever.

(2) Nothing herein contained shall affect any right vested in any person by virtue of a mortgage or charge of immovable property duly registered in the manner provided by law for the registration of such mortage or charge.

I was informed that the decision in *Anuarul Aini*'s case had been confirmed by the Supreme Court.

The principle is equally applicable to customs duties as customs duties are also debts due to the Government.

Thus I am of the view that the customs duties and the sales tax leviable against GPTI have priority of payment over the claims by the debenture holders and the Receivers & Managers for their costs and expenses.

I am also of the view that the claim for EPF contributions also has priority over claims of the debenture holders and the Receivers & Managers - (see *Chuah Teong Hooi & Anor. v. Employees Provident Fund Board* [1990] 2 MLJ 218).

Now I shall consider the priority of payment between the claim by the first defendant for customs duties and sales tax and the claim by the third defendant for the employee's provident fund contributions payable.

The first defendant contends that the sales tax collected by GPTI and not remitted to the first defendant was utilised by GPTI to pay the wages of the employees. A director and an accountant of GPTI had admitted this fact in their statement to the first defendant recorded under s. 34(1) of the Sales Tax Act and s. 101(1) of the Customs Act. Therefore s. 292(3) of the Companies Act 1965 applies.

Section 292(3) provides as follows:

292. (3) Where any payment has been made to any employee of the company on account of wages salary or vacation leave out of money advanced by a person for that purpose, the person by whom the money was advanced shall, in a winding up, have a right of priority in respect of the money so advanced and paid, up to the amount by which the sum in respect of which the employee would have been entitled to priority in the winding up has been diminished by reason of the payment, and shall have the same right or priority in respect of that amount as the employee would have had if the payment had not been made.

Apart from the admission there is no other evidence to prove that in fact the sales tax collected by GPTI had been utilised to pay the wages of the employees. I am not prepared to find that as a fact. At the most, it can only be said that the employees were paid their wages out of a mixed fund of GPTI. There is no evidence that the sales tax collected were kept separately from the other funds of GPTI. I therefore hold that s. 292(3) has no application.

In *Chuah Teong Hooi & Anor. v. Employees Provident Fund Board* [1990] 2 MLJ 218 I had to consider the priority of payment between a claim by the Employees Provident Funds Board and the claim by the Receivers & Managers for their costs and expenses. I held that the EPF claim took priority. In that case I held:

The sums deducted came under s. 15(a). Section 15(b) refers to the amount which the company still owes the EPF as their contributions. These sums are not liable to be attached in respect of any claim whatsoever including the claims by the plaintiffs as receivers and managers.

Whenever there is a sum due from any employer as his contributions to the EPF, from any moneys in the hands of the company or its receivers and managers, the amount due to the EPF must be paid first.

In the present case in respect of the other goods I hold that the claim for EPF contributions take priority over claims for customs duties and sales tax.

Section 66 of the Employees Provident Fund Act 1991, provides as follows:

66. If, at any time before the date of the commencement of a winding up in the case of a company or before the making of a receiving order in the case of a debtor in bankruptcy -

(a) an attachment has been isued against the property of an employer in execution of a decreee against him and any such property has been seized or sold or otherwise realised in pursuance of such execution; or

(b) the property of an employer has been sold, on the application of a secured creditor,

then the proceeds of the sale or other realisation of such property shall not be distributed to any person entitled thereto until the Court ordering the sale or other realisation, has made provision for the payment of any amounts due in respect of contributions payable by the employer under this Act during the twelve months before the date of such order.

I find that this section applies in respect of the goods of GPTI seized by the first defendant pursuant to s. 30(1) of the Sales Tax Act. Under this section the proceeds of sale of the goods must first be applied to pay towards the payment of the EPF contributions for twelve months.

For the reasons stated above I granted the declarations No. 1, 2, and 3 in the affirmative. For declaration No. 4, I gave the following directions:

(1) The goods seized under s. 30 of the Sales Tax Act do not come within the items forming part of property subject to the floating charges.
(2) In respect of the other goods the EPF contributions rank in priority to the sales tax and the customs duties which between them rank equally.
(3) In respect of goods which have been seized under s. 30 of the Sales Tax Act the first defendant is entitled to proceed with the sale in accordance with the provision of the said section. But since s. 66 of the Employees Provident Fund Act 1991 has application, from the proceeds of sale payment must be made for the amount due in respect of EPF contributions payable by GPTI for twelve months if still outstanding after the EPF has been paid from the proceeds of sale of the other goods.

I also directed that the costs of this application be paid from the assets of GPTI prior to the payments to be made.

KOH YING HUAT

v.

KOH KAH HING SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' HJ. ABU MANSOR BIN ALI J.
[ORIGINATING PETITION NO. D5-26-30 OF 1990]
6 AUGUST 1992

COMPANY LAW: Section 181 Companies Act 1965 - Petitioner seeking declarations that defendant company belongs to the family and that the petitioner and his brothers are entitled to 25% equity of the company - Purchase of land financed by petitioner's mother - Land registered in name of eldest son and his wives - Defendant company formed - Land sold to defendant - Allegation that eldest son had agreed to distribute company's shares to his brothers - No distribution - Whether company formed was a family company - Whether land purchased by company was for the family.

TRUST: Purchase of land financed by petitioner's mother - Land registered in name of eldest son and his wives - Family members occupying land - Whether eldest son holding land in trust for family - Trust defined - Whether in the context of old Chinese traditional family practice it was appropriate to apply a presumption of advancement in favour of the eldest son.

PRACTICE & PROCEDURE: Application by petitioner for declarations pursuant to s. 181 of the Companies Act 1965 - Claim for shares purportedly held in trust by eldest son - Whether procedure adopted correct - Whether petitioner has the locus standi to claim on behalf of other beneficiaries - Whether action barred by limitation - Order 2(3), O. 88 r. 5(2), O. 92 r. 4 RHC - Section 22 Limitation Act 1953.

This was a petition pursuant to s. 181 of the Companies Act 1965 for declarations that the defendant company belonged to the Koh family, that the petitioner and his brothers were entitled to 25% equity of the company and that the shares held by Koh Chong Huat (KCH), the eldest son, or KCH's son be held in trust for them in equal shares.

The petitioner's mother financed the purchase of a piece of land which was registered in the name of KCH and his two wives. On 19 October 1981 the defendant company was formed with KCH, his son and the petitioner as shareholders and on 1 June 1982 the land was sold to the defendant. It was the petitioner's contention